152 U.S. 377

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1038.

HARRY DUNCAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RECORD FILED OCTOBER 10, 1893.

(15422.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1038.

HARRY DUNCAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Order allowing writ of error	9	4
Motion to transfer to court in banc	10	4
Order denying motion to transfer to court in banc	11	5

1 To the honorable MELVILLE W. FULLER,
Chief Justice of the Supreme Court of the United States:

Now comes Harry Duncan, by his attorney, Walter M. Farmer, and complains that in the records and proceedings, and also in the rendition of a judgement in a suit between the State of Missouri as plaintiff and the said Harry Duncan as defendant, in the supreme court of the State of Missouri, being the highest court of said State of Missouri in which a decision could be had in said suit, and in which a final judgement was rendered against him on the 13th day of June, 1893, in said suit, wherein Federal questions were presented and determined and proceedings were had as follows, to wit:

The Statutes of the United States (Sec. 709, R. S. of U. S.) provides that a final judgement or decree in the highest court of a State in any suit in which a decision in the suit could be had * * * wherein any title, right, privilege, or immunity under the Constitution of the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution * * * may be reexamined and reversed or affirmed in the Supreme Court upon writ of error.

The records show that in this case a right, privilege, and immunity was claimed under the Constitution of the United States and the decision was against that right, privilege, and immunity as follows, to wit:

2 The 10th sec. of art. 1 of the Constitution of the United States provides, among other things, that no State shall pass any ex post facto law.

Also sec. 15, art. 2 of the constitution of the State of Missouri (1875) provides that no ex post facto law or law retrospective in its operation shall be passed by the general assembly.

Art. 5 of the Constitution of the United States provides that no person shall be deprived of life, liberty, or property without due process of law. And the 14th amendment to the Constitution provides: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law.

And sec. 30 of the bill of rights of the constitution of Missouri provides that no person shall be deprived of life, liberty, or property without due process of law.

Art. 6 of the constitution of Missouri (1875) lodges the judicial power of the State in the supreme court and other inferior courts. And sec. 5 of said art. provides that the supreme court shall consist of five judges, any three of whom shall constitute a quorum.

3 On Tuesday following the first Monday in November of 1890, the following amendment to the constitution of 1875 was adopted by vote of the people:

SEC. 1. The supreme court shall consist of seven judges, and after the first Monday in January, 1891, shall be divided into two divisions, as follows: One division to consist of four judges of the court and to be known as division number one; the other to consist of the remaining judges and to be known as division number two. The divisions shall sit separately

for the hearing and disposition of causes and matters pertaining thereto, and shall have concurrent jurisdiction of all matters and causes in the supreme court, except that division number two shall have exclusive cognizance of all criminal cases pending in said court: Provided, that a cause therein may be transferred to the court as provided in section 4 of this amendment. The division of business of which said divisions have concurrent jurisdiction shall be made as the supreme court may determine. A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments, and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court.

* * * * * * *

SEC. 3. The supreme court shall assign to each division the causes and matters to be heard by it, of which assignment due public notice shall be given, and all laws relating to practice in the supreme court, as well as the rules of the supreme court, shall apply to each division so far as they may be applicable thereto. The opinion of each division shall be in writing, and shall be filed in the causes in which they shall be respec-
4 tively made during the term at which the causes submitted, and such opinions shall be a part of the records of the supreme court.

* * * Sec. 4. When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a decision in which a cause is pending shall so order, the cause shall be transferred to *to* the court for its decision.

Sec. 5. Whenever in the opinion of the supreme court the state of its docket with reference to the speedy disposition of the business of the court will justify the dispencing with the division hereinbefore provided, the court shall dispense therewith, and the court shall thereafter hear and determine all causes pending in it: Provided, however, that the court shall have the power to again divide itself into two divisions, in like manner and with like power and effect as hereinbefore provided, whenever in the opinion of six judges thereof, entered of record, the condition of its docket with reference to the speedy disposition of the business of the court shall so require; and in such division the four judges oldest in commission shall constitute division number one, and the remaining judges division number two.

5 Such being the law this record shows that, on the 28 day of Jan., 1891, there was filed in the St. Louis criminal court an indictment charging Harry Duncan with murder of the first degree, based upon the alleged killing of officer James Brady, on the 6th of October, 1890. That a change of venue was taken to St. Louis County, where upon trial in the circuit court of said county the defendant was convicted of said charge. That in due time the said Harry Duncan prosecuted his appeal to the supreme court of the State of Missouri. The said cause was transferred to division number one, in accordance with the provision of 1890, above set forth. That on the 3rd day of May the case was submitted; that on the 16th day of May the judgement of the lower court was confirmed and the defendant sentenced to hang on the 15th day of June.

That afterwards, on the 26th day of May, the defendant Harry Duncan, by his attorneys, filed his motion for a rehearing before the said division number two, which motion, on the 30th day of May, denied by said division.

That again, on the 7th day of June, the said Harry Duncan, by his attorneys, filed a motion to transfer the said cause to the court in banc and assigned the following reasons, to wit:

That said cause was determined solely upon the judgement of the minority of the cupreme court, and is not properly determined by the supreme court, and is not the judgement of said body. As the said court is the court of final resort, the defendant is entitled to have his case passed upon by a majority of the *the* court.

2. That a Federal question was involved in said cause in this—the concur'ent resolution of the general assembly of the State of Missouri,
6 approved by vote of the people on the Tuesday after the first Monday in November, 1890 (Laws of Mo., p. 322, 1891), amending the constitution of Missouri as adopted in 1875, is in derogation of and in conflict with the provisions of said constitution and of the Constitution of the United States.

3. That said cause should have been heard by the court in banc, because by the records in said cause the offense of which the defendant stood charged was committed on the sixth of October, 1890, and before the proposed amendment (increasing the judges of the supreme court to seven, and constituting divisions numbers one and two) was ratified by vote of the people. The said vote was taken on Tuesday after the first Monday in November, 1890.

4. That the amendment of 1890 is retrospective in its effect. That according to the constitution of of 1875, defendant was entitled to a decision by a majority of the judges of the supreme court (Art. VI, Sec. 5, et seq.).

5. That defendant was entitled to the administration of law as guaranteed him by the constitution of 1875.

6. That he should not be deprived of life without due process of law as guaranteed him by the Constitution of the United States (Art. V, of the amendments of 1791; also Art. XIV, sec. 1), which was or is the law embodied in the constitution of 1875.

The grounds upon which defendant claimed that the said proceedings were in violation of the Constitution of the United States and without due process of law are that the opinion rendered by the three judges of the supreme court was not the opinion of said body, but of the minority
of said court; that he has been denied a hearing before the supreme
7 court as such as guaranteed him by the constitution of the State of Missouri and not due administration of the law as contemplated by the XIV amendment to the Constitution of the United States.

That the State of Missouri made and the supreme court enforced a law against the defendant whereby his privileges and immunities were abridged contrary to the XIV amendment as aforesaid.

That by said provision and proceedings he has been denied the equal protection of the law.

That said provision and proceedings are repugnant to and in conflict with the fundamental principles of our civil and political institutions. To be due process of law it must come within the limit of these fundamental

principles. It would be decidedly repugnant to the spirit of our institutions should any State declare five of twelve jurors sufficient to find the verdict in civil and criminal cases. And so in this case.

That even if the law is to be enforced it should not be made to apply to his case which was prior to the adoption of the said amendment. To do so would be contrary to Art. II, sec. 15, of the constitution of Missouri, against ex post facto law or laws retrospective in their operations; also the 10th sec. of Art. I of the Constitution of the United States.

Notwithstanding the law above cited and the contention of the defendant, the said supreme court denied him this right (on the 13th day of June).

All of which appears in the records and proceedings in said cause. Manifest error hath been done to the great damage of the said Harry Duncan.

Wherefore he prays for the allowance of a writ of error and such
8 other process as may cause the same to be corrected by the Supreme Court of the United States.

WALTER M. FARMER,
Atty. for Petitioner, Harry Duncan.

STATE OF ILLINOIS,
County of Cook, ss.:

Walter M. Farmer, being first duly sworn, on oath states that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true in substance and in fact.

WALTER M. FARMER.

Subscribed and sworn to before me this 16th day of August, 1893.
[SEAL.] WILLIAM M. BOOTH,
Notary Public.

9 AUGUST 16, 1893.

Let the writ of error issue as prayed. This will operate as a supersedeas, and the plaintiffs in error will apply to the Supreme Court of the United States on the first day of the next term thereof for leave to prosecute in forma pauperis.

MELVILLE W. FULLER,
Chief Justice of the United States.

10 Which said motion to transfer to court in banc is in the words and figures as follows:

In the supreme court of the State of Missouri. April term, 1893. No. 6485.

STATE OF MISSOURI
vs.
HARRISON DUNCAN.

Now comes the defendant in the above-entitled cause, and by his attorney moves this honorable court, division No. 2 of said court, to transfer the above cause to the court in banc and assigns the following reasons, to wit:

1. Said cause is determined solely upon the judgment of a minority of the supreme court, and is not properly determined by the supreme court,

and is not the judgment of said body; as the said court is the court of final resort the defendant is entitled to have his case passed upon by a majority of said body.

2. A Federal question is involved in said cause in this: The concurrent resolution of the general assembly of the State of Missouri, approved by vote of the people on the Tuesday after the first Monday, in November, 1890 (Laws of Mo., p. 322, 1893), amending the constitution of Missouri as adopted in 1875, is in derogation of and in conflict with the provisions of said constitution and the Constitution of the United States.

3. Said cause should have been heard by the court in banc because by the record in said cause the offense of which the defendant stands
11 charged was committed on the sixth of October, 1890, and before the proposed amendment (increasing the judges of the supreme court to seven, and constituting divisions No. 1 and 2) was ratified by the vote of the people. The said vote was taken on the Tuesday after the first Monday in November, 1890.

4. That the amendment of 1890 is prospective in its effect. That according to the constitution of 1875 defendant was entitled to a decision by a majority of the judges of the supreme court. (Art. VI, Sec. 5, et seq.)

5. That defendant was entitled to the administration of the law as guaranteed him by the constitution of 1875.

6th. That he should not be deprived of life without due process of law as guaranteed him by the constitution of the United States (Art. 5 of the amendments of 1791; also Art. XIV, Sec. 1, amendments of 1868), which was, or is, the law embodied in the constitution of 1879.

WALTER M. FARMER and
GEO. W. ROYSE,
Attys. for Deft.

And afterwards, on the 13th day of June, 1893, the following further proceedings were had and made by said court in said cause to-wit:

STATE OF MO., RESP.,
v.
HARRY DUNCAN, APP.

Now, at this day, the court having fully considered and understood the motion heretofore filed to transfer this cause to the court in banc, doth order that said motion be and the same is hereby denied.

1038

Office Supreme Court U. S.
FILED.
JAN 12 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

HARRY DUNCAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI, DEFENDANT IN ERROR.

R. F. WALKER,
ATTORNEY-GENERAL OF MISSOURI,
For Defendant in Error.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1893.

HARRY DUNCAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI, DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error, Harry Duncan, was indicted at the January term (1891) of the St. Louis Criminal Court for murder in the first degree, charged with having shot and killed one James Brady, in the city of St. Louis, on October 6, 1890. He was arraigned and entered his plea of not guilty, at the July term, 1891, and at the same time applied for a change of venue, on the ground that the inhabitants of the entire 8th judicial circuit were prejudiced against him. The cause was removed to the Circuit Court of St. Louis county, where it was tried at the September term, 1892, resulting in the conviction of appellant of murder in the first degree. Motions for new trial and in arrest being

WRIT OF ERROR.

United States of America, ss.

The President of the United States of America,

To the Honorable, the Judges of the Supreme Court of the State of Missouri—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between the State of Missouri, plaintiff, and Harry Duncan, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Harry Duncan, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 16th day of September, 1893, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Issued at office in the city of St. Louis, with the seal of the Circuit Court of the United States for the Eastern division of the Eastern district of Missouri, dated as aforesaid.

[SEAL] (Signed) A. P. SELBY,
Clerk of said Circuit Court.

Allowed by MELVILLE W. FULLER,
Chief Justice of the United States.

MOTION TO DISMISS WRIT OF ERROR.

In the Supreme Court of the United States.
October Term, A. D 1893.
Harrison Duncan, plaintiff in error,
vs.
The State of Missouri, defendant in error.
Error to the Supreme Court of Missouri.

Motion of the defendant in error to dismiss the writ of error for want of jurisdiction to hear and determine the same.

And now comes the State of Missouri, the defendant in error in the above entitled cause, by its counsel, R. F. Walker, the Attorney-General of the State of Missouri, and respectfully moves the Court to dismiss the writ of error heretofore granted and issued in said cause, for the reasons following, to wit:

I.

Because it is apparent upon the record, here presented in said cause, that no Federal question was involved in the pleadings, trial, proceedings and determination of the said cause, either in the Circuit Court of St. Louis county or in the Supreme Court of the State of Missouri.

II.

Because it is apparent upon the record that no Federal question was presented to the said Circuit Court of St. Louis county nor to the Supreme Court of the State of Missouri for their determination in said cause.

III.

Because it is apparent from the record that no Federal question was in fact decided by the Circuit Court of St. Louis county, nor by the Supreme Court of Missouri in said cause.

IV.

Because it is apparent from the record that no Federal question was raised or decided in the opinions and judgments, either of the Circuit Court of St. Louis county or of the Supreme Court of Missouri in said cause.

V.

Because it is apparent from the record that no decision of any Federal question was necessarily involved in the rulings, findings, opinions, judgments and decrees, either of the Circuit Court of St. Louis county or of the Supreme Court of the State of Missouri in said cause.

VI.

Because it is apparent upon the record that neither the validity of any statute of the State of Missouri, nor the validity of any authority exercised by or under the State of Missouri, was in anywise drawn in question in said cause, on the ground of being repugnant to the Constitution, treaties or laws of the United States, and that there was no decision nor judgment in said cause in favor of any such validity.

VII.

Because it is apparent upon the face of the record that in the rulings, findings, opinions, judgments and decrees of the said courts in said cause, there is no decision against any right, title, privilege or

immunity specially set up or claimed by the said plaintiff in error, under the Constitution, or any statute of or commission held or authority exercised under the United States.

VIII.

And further, because it is apparent from the assignment of errors filed herein by the plaintiff in error, that no Federal question is presented to this Court for its review or determination.

R. F. WALKER,

ATTORNEY-GENERAL OF MISSOURI,

David A. DeArmond,

For Defendant in Error.

BRIEF AND ARGUMENT.

Brief and argument of defendant in error, in support of its motion to dismiss the writ of error for want of jurisdiction.

Now comes the defendant in error, the State of Missouri, by its counsel, R. F. Walker, the Attorney-General of the State of Missouri, and on behalf of its motion to dismiss the writ of error in the above entitled cause for want of jurisdiction heretofore filed, respectfully presents to the Honorable Court the following points and authorities:

I.

To give this Court jurisdiction under § 709 of the Revised Statutes of the United States, because of the denial by a State Court of any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time in the proper way. To be reviewable here the decision must be against the right *so set up or claimed.* As the Supreme Court of the State was reviewing the *decision of the trial Court*, it must appear that the claim *was made in that Court*, because the Supreme Court was only authorized to review the judgment for errors committed there, *and this Court can do no more.* * * If the right was not not set up or claimed in the proper Court below, the judgment of the highest Court in the action is conclusive, so far as the right of review here is concerned.

Spies vs. Illinois, 123 U. S., 131 (181).

Brooks vs. Missouri, 124 U. S. 394.

Applying that rule to this case, it is apparent upon the record that at the trial of the plaintiff in error in the lower court, no title, right, privilege or immunity was "specially set up or claimed" under the Constitution, laws or treaties of the United States.

It will be seen from the record that the Supreme Court of Missouri passed upon every point saved upon the trial, and presented to that Court for review upon appeal. These points were:

1. That the trial court permitted counsel other than the regular prosecuting officer of the State (who was sick and absent) to conduct the prosecution.

2. That the indictment was insufficient.

3. That certain evidence, claimed to be incompetent and inadmissible, was allowed to go to the jury over the objection of the accused.

4. That the accused was attended by "an armed guard" during the entire trial, and that a witness for the accused (who was himself under indictment for a capital offense, and who had been brought from a distant prison under a writ of *habeas corpus ad testificandum)* was also attended in court by an armed guard.

5. That incompetent jurors were admitted by the Court upon the panel from which the trial jury was to be selected, though none of them sat upon the trial.

6. That certain testimony offered by the accused in his own behalf was excluded.

7. That the trial court erred in declaring the law of the case in its charge to the jury.

8. That prosecuting counsel was guilty of improper utterances in his address to the jury; and

9. That the verdict of the jury was not warranted by the evidence.

In none of these points made in the trial court, and afterward suggested as error in the Supreme Court, was any right, title, privilege or immunity of plaintiff in error under the Constitution, laws or treaties of the United States, "set up or claimed," or even hinted at. No *Federal* question was presented to either court in any way for its opinion, finding, ruling, judgment or decision.

Nor, without any such claim *upon the trial,* does it appear from the record that any right, title, privilege or immunity of the plaintiff in error under the Constitution, laws or treaties of the United States was denied to him; nor does it appear from the record that any opinion, finding, ruling, judgment or decision of the Supreme Court necessarily involved, or was based upon, the construction of any provision of the Constitution or laws or treaties of the United States.

1. The people of a sovereign state have the undoubted right to provide the tribunal which shall determine all cases involving offenses against the laws of such state committed within its borders, and at pleasure to provide for a change in the number or *personnel* of those who, in the court of last resort, are to sit in ultimate judgment: such matters being but mere matters of procedure, the same rule prevails in criminal prosecutions as in civil actions; that the law regulating the same may be changed without infringing any recognized or any substantial right of the accused.

2. The mere change in the number of the judges of the Supreme Court of Missouri, the separation into two divisions of the newly constituted body, and the assignment of exclusive criminal jurisdiction to one of such divisions, cannot by any construction or interpretation of language be held to be a law which "imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rule of evidence by which less or different testimony is sufficient to convict than was required," which is this Court's definition of an *ex post facto* law.

Cummings vs. Missouri, 4 Wallace 326.

3. Article V of amendments to the Constitution of the United States, and so much of Article XIV as is invoked by plaintiff in error, providing that no person shall be deprived of life *without due process of law*, were never intended to limit the powers of the State governments in respect to their own people, but to operate on the National government alone.

Spies vs. Illinois, 123 U. S. 131 (166 and cases cited).

In the light of all the authorities and by parity of reasoning, it cannot be doubted that it was entirely competent for the people to adopt such a change in their *organic law* as to take away from their Supreme Court *as a whole* all cognizance of criminal cases, and to confer such jurisdiction on a portion or division of that Court, though less in numbers and different in *personnel* from the Court as organized when the crime in question was committed. Nor do we see how or in what way the change in the administration of the criminal law as applied to the appellate jurisdiction of a division of such Court deprives a defendant of either due process of law or the equal protection of the law.

Lastly, assuming by the utmost stretch of construction that a Federal question raised by the record, the writ of error should not be

entertained where it is so apparent upon the face of the record that the decision of such Federal question is so plainly right as not to require argument.

Spies vs. Illinois, 123 U. S. 131 (163).

It is therefore respectfully submitted by the defendant in error that it is apparent from the face of the record that this Court has no jurisdiction herein, and this Court is respectfully asked to dismiss the writ of error herein.

R. F. WALKER,
ATTORNEY-GENERAL OF MISSOURI,
David A. DeArmond, For Defendant in Error.

1038

Office Supreme Court U. S.
FILED.
NOV 29 1893
JAMES H. McKENNEY,
CLERK.

TO THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893

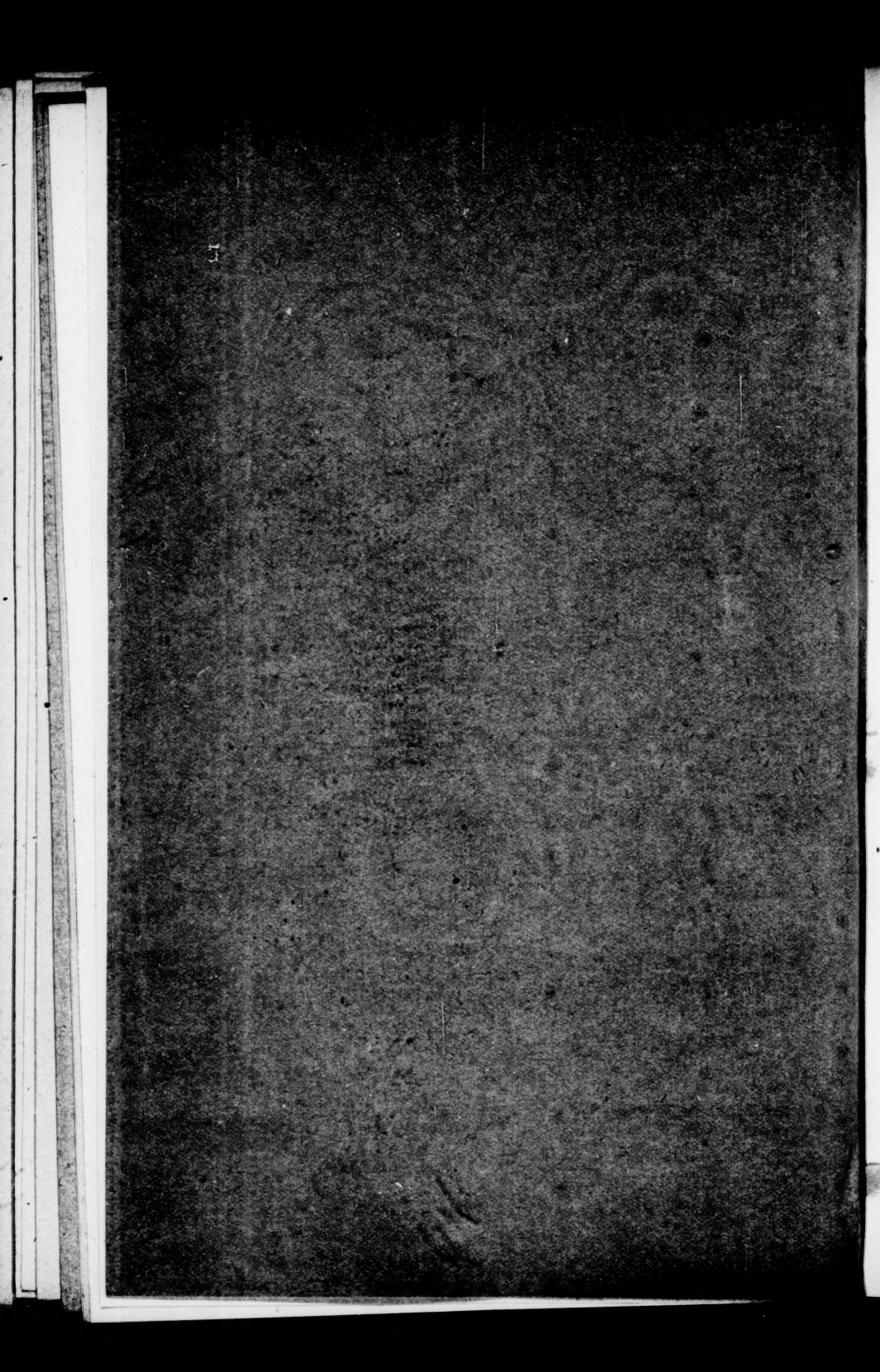
HARRY DUNCAN, PLAINTIFF, IN ERROR,

vs.

THE STATE OF MISSOURI, DEFENDANT IN ERROR,

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS FOR WANT OF JURISDICTION.

E. M. HEWLETT,
WALTER M. FARMER,
Attorneys for Plaintiff in Error.



IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, 1893

HARRY DUNCAN, PLAINTIFF, IN ERROR,

vs.

THE STATE OF MISSOURI, DEFENDANT IN ERROR,

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS FOR WANT OF JURISDICTION.

The plaintiff in error, by his attorneys beg leave of this Honorable Court to submit the following argument and brief in support of the jurisdiction of this Court in his said cause.

I.

It is only necessary to give this Court jurisdiction, that the record discloses that a federal question was raised at the proper time and in the proper way; or that a title, right, privilege or immunity claimed under the Constitution of the United States, or that the validity of a statue of the State of Missouri was drawn in question and that the decision was against the title, right, privilege or exemption specially set up or claimed. Sec. 709 of the Revised Statues of the United States.

II.

The case of Brooks vs. Missouri, cited by the defendant in error simply holds that the title, right, privilege or immunity claimed uuder the Constitution of the United States, must be specially set up or claimed at the proper time and in the proper way. The record will show that the validity of a statue of the State of Missouri was called in question: That said statue had special reference to the composition of the Supreme Court of the State of Missouri and could not be raised in the trial Court.

III.

The Attorney General conceded all the facts necessary to give this Court jurisdiction, but concludes that there is no federal question because:

1. The people of a sovereign state have the undoubted right to provide the tribunal which shall determine all cases involving offences against the laws of such state committed within its borders, and at pleasure to provide for a change in the number or personal of those who, in the court of last resort, are to sit in ultimate judgement; such matters being but mere matters of procedure, the same rule prevails in criminal prosecution as in civil actions; that the law regulating the same may be changed without infringing any recognized or any substantial right of the accused.

2. The mere changes in the number of judges of the Supreme Court of Missouri, the separation into two divisions of the newly constituted body, the assignment of exclusive criminal jurisdiction to one of such divisions, cannot by any construction or interpretation of language be held to be a law which imposes a punishment for an act which was not punishable at the time that it was committed, or imposes additional punishment to that then prescribed, or changes the rule of evidence by which less or different testimony is sufficient to convict than was required, "which is this Court's definition of an expost facto law."

The reasons here stated go to the very core of the contention of the plaintiff in error, as he questions the validity of the statue that he (the Att'y Gen'l) asserts that the people of a sovereign state have the undoubted right to pass. It is this constitution that gives this Court jurisdiction. Sec. 709 R. S. of the U. S.

BRIEF.

It is well settled that this Court will not go into the merits of the question involved, upon motion to dismiss.

I.

If the record show, either by express averment or by clear and necessary intendment, that the constitutional provision did arise and that the court below could not have reached its conclusion and judgement without applying it to the case in hand, then the jurisdiction of this court attaches. It need not appear that the State Court erred in its judgement. It is sufficient to confer jurisdiction, that the question in the case was decided adversely to the plaintiff in error and the court was induced by it to make the judgement it did. Furman vs. Nichol, 8 Wall. 44.

II.

In another case where the right claimed under the constitution of the United States was somewhat obscurely done, the court held; "We cannot therefore, dismiss the writ for want of jurisdiction, although we may have a very clear conviction that the decision of the State Court was correct." Pennywit vs. Eaton, 15 Wall. 380.

III.

In another case decided in 1885, wherein it was claimed that a certain statue was in conflict with the constitution of the United States, the State Supreme Court did not in terms pass upon the claim, nevertheless, this Court held, that the decision of the Federal question was necessarily involved in the judgement of the State Supreme Court, and "this Court therefore, has jurisdiction to inquire whether any right or privilege protected by the constitution of the United States has been withheld or denied by any Court below. And our jurisdiction is not defeated because it may appear, upon examination of this Federal question, that the statues of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied." Chicago Life Insurance Co. vs. Needles, 113, U. S. 574.

There are numerous other cases and decisions of this Court to the same effect. We deem those cited above, however, sufficient to prove that according to the showing of the brief of the defendant in error, the the motion to dismiss must be denied.

E. M. HEWLETT,
WALTER M. FARMER,
Attorneys for Plaintiff in Error.

152 US 385. See briefs etc in U.S. v. Stahl 151 US 366 (Transcripts, vol. 882).

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 885.

THE UNITED STATES, APPELLANT,

vs.

PHILIP R. ALGER.

APPEAL FROM THE COURT OF CLAIMS.

Application for a Rehearing, by William A. Maury, for Appellee and Others in Like Situation.

The undersigned, by permission of the appellee, Philip R. Alger, and his counsel, respectfully requests, in behalf of the appellee and the other officers of the navy who are affected by the recent decision of the Court in the above-entitled case, that the said case may be restored to the docket for oral argument and reconsideration, upon the grounds presented in the application for a rehearing in the case of The United States *vs.* Albert W. Stahl, which application is hereby specially referred to and adopted, in so far as applicable.

In this case the claimant was appointed cadet midshipman September 22, 1876; graduated June 22, 1882, and promoted to midshipman the same day; commissioned ensign June 26, 1884. He resigned November 10, 1890, and on November 11, 1890, was appointed professor of mathematics, to rank from November 1, 1890.

The claimant was given credit on his commission as ensign for his service as cadet midshipman and midshipman, and was paid the pay of an ensign after five years of service, from June 26, 1884, to the date of his resignation, but claims that he has not been allowed credit under the act of March 3, 1883, in the lowest grade, having graduated pay since he entered the navy as professor of mathematics.

The claimant sues for the pay of a professor of mathematics in the third five years from the date of appointment by reason of his prior service in the navy, to wit, from September 22, 1876, to November 10, 1890, by virtue of the provisions of the act of March 3, 1883, and the Court of Claims gave him judgment for the amount claimed, but this Court has reversed this judgment as erroneous.

The undersigned hereby certifies that he has carefully considered the questions involved in this case and the opinion of the Court, and is of the opinion that the case should be reheard, on the grounds stated in the application for a rehearing in the case of The United States *vs.* Albert W. Stahl.

WILLIAM A. MAURY,
Of Counsel, &c.

WASHINGTON, D. C., 1505 Pennsylvania avenue.

With the Author's Compliments

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 886.

THE UNITED STATES, APPELLANT,

vs.

ALBERT W. STAHL.

APPEAL FROM THE COURT OF CLAIMS.

Application for a Rehearing by William A. Maury for Appellee and Others in Like Situation.

WILLIAM A. MAURY,
Of Counsel, &c.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 886.

THE UNITED STATES, APPELLANT,

vs.

ALBERT W. STAHL.

APPEAL FROM THE COURT OF CLAIMS.

Application for a Rehearing by William A. Maury for Appellee and Others in Like Situation.

The undersigned, by permission of the appellee, Albert W. Stahl, and his counsel, respectfully requests, in behalf of the appellee and the other officers of the navy who are affected by the recent decision of the Court in the above-entitled case, that the said case may be restored to the docket for oral argument and reconsideration upon the following grounds:

It will be remembered that the appellee, after entering the Naval Academy on September 14, 1876, and reaching the grade of an assistant engineer, resigned his commission

on August 10, 1887, and on August 11, 1887, was appointed and commissioned an assistant naval constructor, and that, as such, he has been credited with the whole period of his service in the navy and has received longevity pay upon the theory that the grade of assistant naval constructor was the lowest grade having graduated pay held by him "since last entering the service," within the meaning of the act of March 3, 1883, c. 97 (22 Stat., 473), which provides that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy or both and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer *since last entering the service.*"

But, through some inadvertence, no doubt, the appellee has received no time credit as assistant engineer nor the additional pay resulting therefrom under the act, and this suit was brought to recover the amount necessary to make up to the appellee what he claims to be due him on the score of longevity pay during the life of his commission as assistant engineer.

The Court of Claims gave judgment for the amount sued for, which this Court holds was error, not, however, because the appellee was not entitled under the act of 1883 to the time credit and the longevity pay resulting therefrom while an assistant engineer, as claimed by him, but because the Government, as alleged, had become entitled to deduct from the amount thus due the supposed excess of pay the appellee had been improperly drawing as assistant naval constructor on the theory that he was entitled to receive longevity pay as such, whereas this Court holds that he was not so entitled, because his appointment as assistant naval constructor did not constitute a re-entry into the navy, but was only a continuation of his former service, and, accordingly, the judg-

ment was reversed and the case sent back for further proceedings in accordance with the Court's opinion.

If the case had been orally argued it is more than probable that the attention of the Court would have been called to some important considerations of a public and general character which do not seem to have been mentioned or weighed.

In the first place, the act of the appellee in resigning his commission as assistant engineer preparatory to his appointment as an assistant naval constructor was in obedience to a *requirement* of the Navy Department *as a necessary step in an officer's transfer from one branch of the service to another*, and if the appellee had not been mindful of this practice by sending in his resignation it would have been required by the department before issuing his commission as an assistant naval constructor. This is conclusively established by the letter of the Secretary of the Navy of February 28, 1894, which, together with the letters that called it forth, is printed at the end of this brief, and in which the Secretary states that "*it has been the invariable practice of the Navy Department to require officers serving in one branch of the naval service to resign from the navy before accepting appointment to any other branch of the service.*" * * *

In view, then, of this well-established practice, of which it is conceived this Court will take notice, the intimation, if not direct imputation, in the Government's brief that the appellee's act in resigning was a mere subterfuge for a sordid purpose was an unjust and unwarrantable reflection upon the appellee and the other honorable gentlemen of the navy who are in his situation, as well as disrespectful to a great department of the Government, and, no doubt, misled the Court into some suspicion of improper conduct on the part of the appellee.

It is an equally well-known fact that in the Navy Department and in the navy generally it has been understood from the passage of the act of 1883 down that a transfer from one

branch of the service to another entitled the officer transferred to longevity pay under the act, whether such officer had already had the benefit of the act or not before his transfer.

In other words, the Secretary of the Navy, in the performance of his duty of interpreting and applying the laws appertaining to that arm of the service, has always held that the proceeding of transferring an officer from one branch of the service to another *involved, first, a severance of all connection with the service and then a re-entry into it.* And hence when the appellee was transferred to the construction corps his name was placed *at the foot of the list of assistant naval constructors* in obedience to section 1485, Revised Statutes, which provides that "The officers of the staff corps of the navy shall take precedence in their several corps and in their several grades, and with officers of the line with whom they hold relative rank, *according to length of service in the navy.*"

In short, the appellee, so far as his rank or precedence in the construction corps is concerned, was treated *precisely as though his transfer had been his first entry into the navy.*

This is also established incontrovertibly by the letter of the Secretary of the Navy of February 28, 1894, and the other letters already referred to and hereto annexed. In his letter the Secretary says that "*it has further been the uniform practice to place the names of such officers* [transferred to one corps from another] *without regard to their previous rank, at the foot of the list of officers* in the new corps. *In such cases it has been the practice to require a new oath of office to be taken, which is not required in case of an ordinary promotion. It appears from the above statement that the department has always held that such transfer constitutes a re-entry into the navy, and accordingly officers so transferred have been placed at the foot of the list of the corps which they enter.*"

Now, this practice of the department, of which the Court will take notice, seems wholly at war with the idea advanced

in the Government's brief that the appellee's service in the engineer and construction corps is one continuous service; for upon that theory we should expect to find the appellee transferred to an equivalent rank in the construction corps to what he had held in the engineer corps, instead of being sent to the foot of the list, as he undoubtedly was.

In view, then, of this rooted and well-known practice of the Navy Department, it is somewhat surprising that the counsel for the Government should have argued, with apparent confidence, that the continuity of the appellee's service in the navy was not interrupted by his transfer from the engineer to the construction corps *any more than if he had been promoted to another grade in the engineer service.* This line of argument can only be accounted for as being the result of an apparent failure of counsel to recognize the distinction between *transfer* and *promotion,* which they seem to treat as interchangeable terms, although radically different.

In doubtful cases this Court is accustomed to pay no little deference to the meaning placed on a statute by the department of the Government whose duty it is to apply it to its subject-matter, and it is respectfully submitted that it would seem that under this rule of decision the meaning placed on the act of 1883 by the Navy Department, ever since its passage, and supported by the judgment of the Court of Claims, should be allowed controlling effect in the face of any doubt that may becloud the meaning of Congress.

In view, then, of these considerations, now seemingly brought to the Court's attention for the first time, it is respectfully submitted, as an additional argument entitled to weight, that it would be severe if officers who have been transferred in the naval service and received longevity pay on the faith of this long-prevailing interpretation of the act of 1883 should now be compelled, upon a mere mistake of law, to refund what they have honestly and innocently received as their due.

As the chief of the Bureau of Construction and Repair says in his letter of February 14, 1894, hereto annexed, "the above payments having been made by the accounting officers of the Treasury in conformity with previous decisions of the Court of Claims and the established rulings of the Navy Department as to re-entry into the service, *it would seem a very great hardship* to compel these officers to make restitution of the money paid by the Government's authorized agents in conformity with legal decisions, said payments having been received by the officers themselves in goed faith as their right, in virtue of their previous experience in the service."

But, aside from the inexpediency of unsettling what has been once settled, the interpretation here contended for should be adhered to, because, as we hope to show, it is closely interwoven with the good of the service, while, on the other hand, that insisted upon by the Government would, if carried into effect, produce inequalities in pay which would be derogatory to the rank of the officers who have been transferred from one branch of the service to another under the old view of the act of 1883, and subject them to a demoralizing influence, springing from a sense of disappointment and of disparaging discrimination in favor of their juniors in the service, and would, furthermore, tend to cripple the service by placing a serious obstruction in the way of appointments in the future from one branch of it to another.

To show, in the striking way of concrete examples, how unjustly the view of the statute contended for by the Government would operate, let us take for illustration the cases of Assistant Naval Constructors Lloyd Bankson and Richmond P. Hobson.

Bankson, who was appointed from the rank of assistant engineer on July 1, 1889, and who has been in the service sixteen years and four months, all told, would draw pay under the ruling of the Court at the rate of $2,200 per

annum, whereas Hobson, who was appointed from the rank of naval cadet on July 1, 1891, and who has been in the service eight years and eight months only, is by the operation of the act of 1883 entitled to pay at the rate of $2,600 per annum. Thus Bankson, who, by virtue of seniority, ranks Hobson in the construction corps, receives $400 less pay, which must ever be a solecism and a contradiction to the military apprehension.

By applying the interpretation contended for by the counsel for the Government to the following examples taken from the corps of professors of mathematics it will be more manifest still that the act so construed will defeat the underlying principle of longevity pay by placing a premium *on leaving the service and then returning to it after some considerable interval with impaired efficiency.*

In 1873 W. W. Hendrickson, a lieutenant commander in the navy, resigned for the purpose of accepting an appointment as professor of mathematics, was so appointed, and was allowed by the Treasury Department the benefits of his previous thirteen years' service. In 1877 H. D. Todd, who had also resigned when a lieutenant commander, in 1866, but who had spent the intervening eleven years in civil life, was appointed a professor of mathematics, and he also was allowed by the Treasury Department the benefit of his previous naval service; but, under the view contended for by the Government, the former officer would be deprived of the benefits of his service in the line of the navy, while the latter, his junior in rank, would continue to receive credit for all his service and would thus have the higher rate of pay *for the very reason which should give him the lower.*

It would also seem proper to bring to the attention of the Court the fact that there are only fifteen officers who could in any way be affected by the recent decision of the Court, and they are officers who were appointed to their present positions by reason of special qualifications, their previous service in other branches of the navy being considered of

great benefit to the Government in the performance of their new duties. In view of this fact it would seem a special hardship to deprive them of the benefits of such previous service in computing their pay, while other transferred officers whose service was interrupted by a period of civil employment of greater or less length and whose professional knowledge must have deteriorated somewhat in the interval receive all the benefits of their previous service.

There would seem to be little room for doubt, therefore, that the enforcement of this new reading of the statute would necessarily have a disparaging effect on the rank of all officers in Bankson's situation and would prove a source of more or less demoralization, besides tending, as we have already said, to hamper the service by discouraging transfers in cases where, under the ruling of the Court, the officer transferred would not be entitled to a time credit on his new commission, because an officer could hardly be expected to be willing to accept a transfer which would entail such sacrifices. And this, it is proper to remark, is *a very important consideration* in favor of adhering to the old interpretation, for *all appointments to the construction corps are made from the line and engineer corps* and not from the civil walk.

The good of the service is for that reason deeply implicated in the old practice.

In his letter to the Secretary of the Navy of February 14, 1894, hereto annexed, the chief of the Bureau of Construction says:

"If the present decision of the Court holds, its immediate effect upon the construction corps will be to place certain officers *in a most anomalous condition as regards pay*, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, *the seven senior assistant constructors will be receiving less pay than the assistant constructor now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors.*" [Italics our own.]

Again, he says:

"I do not consider it proper for me to deal in the least with the question of law involved, but in equity it seems that an unwitting injustice has been done to officers whose *high class-standing, special qualifications, and previous service caused their selection for appointment to other corps of the service in the interests of the Government* and yet who find themselves, after a lapse of several years, *deprived of all the benefits of their previous service and placed in a worse position as regards pay* than *those many years their juniors.*" [Italics our own.]

It will be seen that the Secretary of the Navy, in his letter hereto annexed, is in entire agreement with the chief of the Bureau of Construction.

This Court being powerless to reach the firmly rooted practice of the Navy Department that treats a transfer as a re-entry into the service, that being a matter which falls within the inviolable domain of executive discretion, it is respectfully submitted that the only way to preserve consistency and avoid the anomalies and evils above pointed out seems to be by adhering to the interpretation placed on the act by the department having full authority over the whole subject and a more intimate acquaintance with the bearings of the act than any other expositor or department of the Government could expect to have.

As there is no intimation in the law that the right to longevity pay is dependent on any particular time during which the officer has been out of the service when he last entered it, and as the officer transferred is during the interval between resignation and reappointment, however short the interval may be, as much out of the service, according to the settled practice of the Navy Department, as though he had laid down his first commission without any expectation of reappointment, it would seem that the Court may restore harmony by giving the old interpretation its sanction *without doing violence to a single word of the statute.*

But, aside from the act of 1883, it is respectfully submitted that the appellee ought to have an opportunity to argue the question whether the United States is entitled to recover back money paid him under a mistake of law and with full knowledge of all the facts.

This precise question was not raised by the counsel for the Government, and, it would seem, could not have been properly raised in the state of the pleadings, the Government not having pleaded the alleged excessive payments by way of set-off, and the claimant, being therefore completely without notice by the pleadings that any such question as his liability to refund money paid to him as compensation, under a mistake of law, would be raised, should be allowed to discuss the question, especially as it is *res integra* in this Court.

The Court of Claims has held that the Government cannot, any more than an individual, recover back money upon the ground that it was paid under a mistake of law. (Hedrick *vs.* U. S., 16 Ct. Cl., 88; see also Miller's case, 19 *ib.*, 354; Palen's case, *ib.*, 394; Hartson's case, 21 *ib.*, 451.)

But this Court has never decided the point, though it has several times referred to it. (U. S. *vs.* Philbrick, 120 U. S., 59; McElrath *vs.* U. S., 102 U. S., 441; U. S. *vs.* Burchard, 125 U. S., 177.)

It is respectfully submitted that the reasons above given appear to be sufficient to entitle the appellee to a rehearing, or, at the very least, entitle him to request the Court to strike from its opinion, in the case of United States *vs.* Philip R. Alger, the reasoning and observations in which are understood to apply to the case of the appellee as well, the intimation that it is a possible hypothesis in the case that the appellee might have sent in a formal resignation "for the purpose of eluding the statute and claiming longevity pay on the higher scale."

The appellee and the other officers who are in his situation feel the sting of the Court's intimation all the more be-

cause they believe it to be undeserved, and that the Court will so consider it in the light of what is above stated.

And the undersigned doth certify that he has carefully considered the questions involved in this case and the opinion of the Court, and is of the opinion that the case should be reheard.

WILLIAM A. MAURY,
Of Counsel, &c.

WASHINGTON, D. C.,
1505 *Penn. Ave.*

APPENDIX.

LETTER OF ASSISTANT NAVAL CONSTRUCTOR W. L. CAPPS.

(Copy.)

NAVY DEPARTMENT,
BUREAU OF CONSTRUCTION AND REPAIR,
WASHINGTON, D. C., *February* 14, 1894.

SIR: 1. A recent decision of the Supreme Court seriously affects the status of commissioned officers who have resigned from one branch of the service and have been appointed to another, inasmuch as it deprives such officers of the benefits of their previous service in computing longevity in the lowest grade having graduated pay.

2. The immediate effect of this decision is to reduce the pay of officers at the head of the list of assistant naval constructors to an amount less than that allowed their juniors in the same grade who entered the naval service and the construction corps several years after those at the head of the list.

3. Moreover, in the case of Naval Constructors Armistead, Baxter, and Stahl, and Assistant Naval Constructor Capps, it checks against their pay the amount claimed to have been overpaid them by reason of crediting these officers with their previous service in the line and engineer corps of the navy.

4. The invariable practice of the Navy Department has been to regard transfer from one branch of the service to another as a re-entry into the service, as is clearly shown by the department's requirement that officers should resign their commissions before being appointed to another corps, and placing them at the bottom of the list of officers of the corps to which they are transferred, even though juniors in the line and engineer corps may become seniors in the construction corps, as has already happened in several instances.

5. A similar method is in force in the army, where trans-

fer from the line to a staff corps involves resignation of the former commission and necessitates an officer's going to the bottom of the list to which transferred. As in the navy, this sometimes results in a change of relative position, seniors in the line becoming juniors in the corps to which last appointed.

6. The above methods of resignation and transfer have been unquestioningly accepted by the officers transferred as just and fair, and the accounting officers of the Treasury and Court of Claims have, in the cases of certain officers of the construction corps, allowed them the benefits of their previous service and paid them accordingly, such pay having been received for the past six years.

7. Should the present construction of the Supreme Court as regards the status of these officers be considered final, it will work very great injustice to certain professors of mathematics and naval constructors who resigned their commissions in other branches of the service and were then appointed to their present corps, believing that established rulings of the Treasury and Navy Departments would not be disturbed, and that they would continue to receive in their new grades the benefits of their previous service, and not be placed at a disadvantage as compared with their juniors in rank in the new corps, who are also their juniors in length of service in the navy.

8. In view of the above facts I beg to request permission from the department to seek relief from Congress, and also request that in its endorsement the department may call attention to its practice in making such appointments, considering them as re-entries into the service, and may make such other remarks as it may deem proper concerning the justice of affording relief to the officers so injuriously affected by the decision of the Supreme Court.

Very respectfully,

(Signed) W. L. Capps,
Assistant Naval Constructor, U. S. N.

The Secretary of the Navy.

LETTER OF THE CHIEF OF THE BUREAU OF CONSTRUCTION.

NAVY DEPARTMENT,
BUREAU OF CONSTRUCTION AND REPAIR,
WASHINGTON, D. C., *February* 14, 1894.

SIR: 1. In forwarding the enclosed communication from Assistant Naval Constructor Capps, I desire to express my hearty approval of any measure which may afford relief to those officers who have been so unfortunately affected by a recent decision of the Supreme Court.

2. If the present decision of the Court holds, its immediate effect upon the construction corps will be to place certain officers in a most anomalous condition as regards pay, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, the seven senior assistant constructors will be receiving less pay than the assistant constructor now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors.

3. Naval Constructors Armistead, Baxter, and Stahl having been promoted, their present pay will not be affected, but their accounts will be charged with the amount claimed to have been overpaid them as assistants. Assistant Naval Constructor Capps, not yet having received his promotion to the grade of naval constructor, will have his pay immediately reduced to that received by the junior member of the corps, and in addition will have charged against him the total amount claimed to have been overpaid him by the accounting officers of the Treasury during the past six years by reason of his having been credited with his previous service in the line of the navy.

4. The above payments having been made by the accounting officers of the Treasury in conformity with previous decisions of the Court of Claims and the established rulings of the Navy Department as to re-entry into the service, it would seem a very great hardship to compel these officers to make restitution of the money paid by the Government's authorized agents, in conformity with legal decisions, said payments having been received by the officers themselves in good faith as their right in virtue of their previous experience in the service.

5. I do not consider it proper for me to deal in the least

with the question of law involved, but in equity it seems that an unwitting injustice has been done to officers whose high class-standing, special qualifications, and previous service caused their selection for appointment to other corps of the service in the interests of the Government, and yet who find themselves after a lapse of several years deprived of all the benefits of their previous service and placed in a worse position as regards pay than those many years their juniors.

6. Aside from the interests of individuals involved in this case, I beg to impress upon the department the urgent necessity of taking such measures as it may deem just and expedient to rectify a wrong which would tend to impair the efficiency of the construction corps by giving least compensation to those whose greater experience and responsibility certainly entitle them to most consideration.

Very respectfully,

(Signed) PHILIP HICHBORN,
Chief Constructor, U. S. N., Chief of Bureau.

The SECRETARY OF THE NAVY.

LETTER OF THE SECRETARY OF THE NAVY.

NAVY DEPARTMENT,
WASHINGTON, *February* 28, 1894.

SIR: Referring to your letter of the 14th instant, forwarded through the chief of the Bureau of Construction and Repair, in which you state that the recent decision of the Supreme Court in the case of The United States, appellant, *vs.* Albert W. Stahl seriously affects the status of commissioned officers who have resigned from one branch of the service and have been appointed to another, inasmuch as it deprives such officers of the benefits of their previous service in computing longevity in the lowest grade having graduated pay, and ask permission to seek relief from Congress, I have to state that, after a careful consideration of the facts set forth in your letter and in that of the chief of the bureau, the department deems it entirely proper that you should seek such relief, and your request is therefore granted.

In the decision in question and in that of The United States *vs.* Philip R. Alger, therein cited, the Court holds that where an officer resigns from one corps of the navy for the

purpose of accepting an appointment in another his service is to be regarded as continuous service.

The chief of the Bureau of Construction and Repair, in his communication above mentioned, states that the immediate effect of this decision upon the construction corps "will be to place certain officers in a most anomalous condition as regards pay, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, the seven senior assistant constructors will be receiving less pay than the assistant constructors now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors."

It has been the invariable practice of the Navy Department to require officers serving in one branch of the naval service to resign from the navy before accepting appointment to any other branch of the service, and it has further been the uniform practice to place the names of such officers, without regard to their previous rank, at the foot of the list of officers in the new corps.

In such cases it has been the practice to require a new oath of office to be taken, which is not required in case of an ordinary promotion.

It appears from the above statement that the department has always held that such transfer constitutes a re-entry into the navy, and accordingly officers so transferred have been placed at the foot of the list in the corps which they enter.

Under these circumstances, and inasmuch as a change in the practice of the department in respect to the rank and pay of officers who by reason of special qualifications and previous service have been selected for appointment to other corps would result in serious hardship to such officers, the department, concurring in the recommendation of the chief of the Bureau of Construction and Repair on the subject, gives its approval to your request for permission to seek relief from Congress.

Very respectfully,

(Signed) H. A. HERBERT,
Secretary of the Navy.
(S. C. L.)

Assistant Naval Constructor W. L. CAPPS, U. S. N.,
Navy Department.